In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, et al., *Petitioners,*

vs.

APOLINAR NAVARETTE, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A to the Petition for Writ of Certiorari and is reported at 536 F.2d 277.

JURISDICTION

The order of the Court of Appeals denying rehearing filed on July 29, 1976 appears as Appendix B to the petition. The Petition for Writ of Certiorari was timely filed, docketed in this Court on September 28, 1976, and granted on January 17, 1977.

The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

STATUTES INVOLVED[1]

Section 1983 of Title 42, United States Code provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress."

QUESTION PRESENTED

Whether negligent failure to mail certain of a prisoner's outgoing letters in 1971-1972, states a cause of action for damages under section 1983?

STATEMENT OF THE CASE

With the aid of counsel, Navarette filed a second-amended complaint on January 4, 1974 in the United States District Court for the Northern District of

[1]The text of other statutes or regulations cited in this brief appears in the attached appendix.

California (R 90, A 3).[2] This is the complaint that was acted upon by the district court and the Court of Appeals and which is before this Court. It alleges nine causes of action *solely for damages* under Title 42, United States Code section 1983.

In the complaint, Navarette, a state prisoner, alleged that the defendants[3] failed to mail thirteen of his letters in 1971 and 1972 (A 6-8)[4] and failed to

[2]This was actually the fourth complaint filed in this action. The litigation was begun on August 14, 1972, by the filing of a *pro se* complaint, *Navarette v. Buwalda, et al.*, No. C-72-1259 SW which was dismissed without prejudice on April 27, 1973.

A second *pro se* complaint, was filed on October 30, 1972, and was given a different case number, C-72-1954 SW (R 1-11). That complaint was dismissed by order filed February 9, 1973 (R 20, 192). This order dismissed plaintiff's mail interference claim insofar as it alleged interference with access to the courts (R 171). No appeal was taken from this order nor was this claim reasserted in the subsequent complaints. (R 34).

With the aid of counsel, a third complaint was filed on April 27, 1973 (R 193). In response to defendants' motion to dismiss, filed May 25, 1973 (R 35), the third complaint was withdrawn on July 27, 1973, upon agreement between counsel that plaintiff file yet another amended complaint (R 72-74).

[3]The defendants include three subordinate Soledad Prison correctional officers: Neal, Kramer and Johnson, who were responsible for monitoring mail. The other three defendants are supervisory prison officials: Director of the California Department of Corrections Procunier, Soledad Prison Warden Stone and Associate Warden Morris (A 4-5).

[4]Navarette's prison mail records disclose that more than 150 items of his correspondence were mailed to attorneys, friends, family, courts, legislators and other public officials during the same period (R 121-136). The accuracy of these records was not disputed. The records also show that as to allegedly unmailed items (2)-(5) and (7)-(13), the addresses were not on Navarette's approved correspondence list (R 121) and could well have been refused mailing for that reason alone (R 145: Regulation D2403). The records do show a number of specially permitted letters were mailed to the addressees named in items (8) (10) and (11) (R 131, 133). As to items (2)-(4), the addressees were prison inmates and the letters could well have been refused mailing for that additional reason (R 145: Regulation 2402(13)). Item

mail five of these letters by registered mail (A 9), thereby depriving him of his right of free speech (A 9-10). No denial of access to counsel or to the courts was alleged.[5]

In the third cause of action it is alleged that these acts were done "negligently"[6] and that three supervisory defendants were "negligent" in failing to furnish sufficient training to the subordinates regarding evaluation of prisoner mail (A 12-13).[7]

(6) concerns Navarette's letter to La Casa Legal de San Jose, about February 1972, enclosing drafts of his civil complaint in this action and requesting representation (R 93:9-12). The record shows that on February 2, 1972, La Casa attorneys filed a brief herein (R 22) and have since continuously represented Navarette. Item (1) remains as an alleged first amendment deprivation. (R 75, 84-85) solely based on negligence (R 87, 129).

[5]*See* footnote 2, *ante,* and footnote 8, *post.*

[6]In the first cause of action it is alleged that such acts were done "deliberately" and "in knowing disregard" of applicable prisoner mail regulations and of plaintiff's right of free speech (A 9-10). The second cause of action alleges that the same acts were done "in bad faith disregard" of such regulations and right (A 11). These two claims have been treated by the Court of Appeals as encompassing but one cause of action (App. Pet. ii).

[7]The fourth cause of action alleged that the supervisory defendants deliberately terminated a law student-inmate visitation program in which Navarette participated and removed him from his job as a prison law librarian solely to hamper his legal activities in knowing disregard of his constitutional rights of free speech and due process (A 13-16). No allegation of denial of access to counsel or the courts appears (A 15). The fifth claim alleges that the same acts were deliberately done in bad faith disregard of plaintiff's rights; the sixth claim alleges that the same acts were done in "negligent disregard" of plaintiff's legal activities (A 16-18).

In claims seven, eight and nine, Navarette realleges the substance of counts one through six against the three supervisory defendants, upon a theory of vicarious rather than personal liability (A 18-21). In addition, all nine claims purported to allege a conspiracy in violation of 42 U.S.C. § 1985. No injunctive or declaratory relief is sought. Navarette seeks only damages: $10,000.00 in actual damages and $90,000.00 in punitive damages as to each defendant on each cause of action (A 10, 15, 21).

On May 3, 1974, the district court filed its order granting summary judgment in favor of defendants on causes one, two, and three, and dismissing causes four through nine for failure to state a federal claim (R 187). Notice of appeal was filed on June 4, 1974 (R 188).

The Court of Appeals filed its opinion on February 9, 1976, holding that claims one and two stated a section 1983 cause of action for deliberate interference with a prisoner's first amendment right of free expression in his correspondence;[8] that claims four and five stated a section 1983 cause of action for deliberate interference with a prisoner's right of access to the courts;[9] and that claims three and six stated a section 1983 cause of action for negligent interference with the same rights (App. Pet. ii, vi, viii). It also held that the claims of liability based on *respondeat superior* (claims 7, 8, 9) did not state a section 1983 cause of action and that all nine claims failed sufficiently to allege a section 1985 conspiracy (App. Pet. ix).

As to Navarette's third claim, i.e., the negligent failure to mail his outgoing letters, the Court of Appeals found that section 1983 "places no narrow limitation on the nature or quality of the conduct which it makes actionable, but concerns itself entirely with the consequences of that conduct" [App. Pet.

[8]The Court of Appeals expressed no opinion whether Navarette's allegations of mail interference stated a claim for deprivation of his right to counsel or of access to the courts (App. Pet. iii, n. 1).

[9]One judge dissented on this point (App. Pet. x-xviii).

vii]. From this premise, the Court of Appeals held that if there has been a deprivation of a federally protected right by reason of tortious conduct engaged in by a state public official acting under color of state law, to be actionable under section 1983, that deprivation "need not be purposeful" (App. Pet. vii). Thus, the allegation in the third claim "that state officers negligently deprived him of those [mail] rights states a § 1983 cause of action." [App. Pet. viii.][10]

SUMMARY OF ARGUMENT

A public official's negligent conduct, is not an intentional deprivation of a constitutional right and therefore cannot be a basis for a cause of action under section 1983, for two reasons.

First, historically the Ku Klux [Klan] Act of 1871 was designed only to reach intentional conduct, including such unwillingness to act in the face of a known duty to do so, as would constitute deliberate indifference to the consequences of the failure to act. Second, this Court's decisions confine the modern interpretation of the act to precisely such conduct.

Section 1983 was enacted to provide a remedy for "an official's abuse of his position." *Monroe v. Pape,* 365 U.S. 167, 192 (1961). Abuse presupposes intentional conduct, not negligence. "[T]he survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" are not thought to have a 1983 claim. *Paul v. Davis,* 424 U.S. 693, 698 (1976). Though the harmful consequences be identical, only when they result from intentional conduct, including "deliberate indifference", and not simply from negligence, is there a section 1983 cause of action. *Estelle v. Gamble,* ..... U.S. ....., 45 L.W. 4023, 4025-4026 (1976).

To add a negligence theory of 1983 liability to the already heavy flow of civil rights litigation would have a staggering impact on the federal courts. It would also subject thousands of state and local public officials to the burdens of jury trial and possible personal liability in damages. This is especially so when the intimate relationship of state prisoners and the state officers who supervise their confinement provides an infinite capacity for dispute and litigation. *See, Preiser v. Rodriguez,* 411 U.S. 475, 492 (1972).

In any event, Navarette suffered no constitutional deprivation in 1971 and 1972. This Court in 1974 expressly declined to create a first amendment right of a prisoner to correspond and recognized solely the right of the person outside prison to correspond with the inmate. *Procunier v. Martinez,* 416 U.S. 396, 408 (1974). Where the "right" asserted has not been recognized by this Court and especially where it has not even been articulated by the lower federal courts, no federal cause of action in damages exists. A prison

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[10]On February 23, 1976, defendants filed a petition for rehearing and suggestion for rehearing in banc. On July 29, 1976, the petition for rehearing and suggestion for rehearing in banc was denied, one member of the panel voted to grant panel rehearing and recommended that in banc rehearing be granted. The Court of Appeals has stayed its mandate pending action by this Court.

official "is not charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557 (1967). He is liable only for acting in disregard of "settled, undisputable law", of "basic, unquestioned constitutional rights." *Wood v. Strickland,* 420 U.S. 308, 321-322 (1975).

ARGUMENT

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER SECTION 1983

In order to state a claim cognizable under section 1983, a plaintiff must show (1) that public officials have intentionally deprived him of a right secured by the federal constitution and (2) that such deprivation was effected under color of state law. *Paul v. Davis,* 424 U.S. 693, 696-697 (1976).

In *Monroe v. Pape,* 365 U.S. 167, 187 (1961), this Court dispensed with any need for a showing that a public official being sued under section 1983 had *specifically* intended to violate a plantiff's constitutional rights.[11] However, *Monroe* did not dispense with the need to show that the conduct engaged in was intentional. In stating that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions", *Monroe* was referring to its own facts showing intentional conduct by police officers so fla-

[11]Of course negligent conduct was not at issue and was not considered by the Court in *Monroe.*

grant that they were bound to know it would, as a "natural consequence", deprive plaintiffs of their constitutional rights.[12] So viewed, *Monroe* is entirely consistent with the Court's present standard articulated in a series of recent decisions that public officials are liable under section 1983 only if they act intentionally either with malicious intent to cause a deprivation of rights or with deliberate indifference to "clearly established" rights of which they knew or reasonably should have known. Negligent conduct is not within such a formulation.

A. Congress Intended to Impose Liability for Intentional Conduct Only.

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973). The controlling concern of the proponents of the legislation was the wave of violence and terror perpetrated by the Ku Klux Klan against both blacks and their white sympathizers. *Id.* However, equally important was the legislators' concern for the inaction of the state and local governments to control the situation. *Id.* at 426. For example, Representative James A. Garfield of Ohio, the future President, noted that the problem was not that state laws were inadequate, "but that even where the laws are just and equal on

[12]*See,* McCormack, *"Federalism and Section 1983"*, 60 Va. L.R. 1, 54-55 (1974); *see also* 2 Devitt and Blackman, Fed. Jury, 177 (Intent—defined), 156 (Negligence—defined), 285-290 (Civil Rights cases).

their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection . . .'"[13]

As one commentator has noted:

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[14]

Thus, the conduct for which the Ku Klux Act was to provide a remedy was intentional conduct, of the type classified either as crimes or intentional torts, which resulted in the deprivation of a fourteenth amendment right. Nothing in the history or statutory language itself refers to negligence in any form.[15]

Neither does the use of the word "neglect" in the Act import negligence. The word is used only in section 1986 and not in section 1983.[16] Its meaning in

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[13]Cong. Globe, 42nd Cong., 1st Sess. 390 (1871), Appendix 153.

[14]Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277, 281 (1965).

[15]Negligence has been considered a separate tort since 1825 (W. Prosser, *Law of Torts*, p. 140 (4th ed. 1971), well before adoption of section 1983.

[16]The specific inclusion of the term "neglect" in 1986, but not in 1983, was deliberate and evinces a congressional intent to limit section 1983 to affirmative intentional conduct. (*Compare Monroe v. Pape* (365 U.S. at 187) considering the omission of the word "wilfully" in section 1983.) Such intentional conduct includes a refusal to act upon a request to perform a clear duty. The "deliberate indifference" of *Estelle v. Gamble*, 45 U.S.L.W. 4023 (1976), seems to center about the refusal to act. *Id.* Particularly 4025 n. 10.

section 1986 was explained by Representative Burchard of Illinois who said liability attached only when "secret combinations of men are *allowed* by the Executive to band together to deprive one class of citizens of their legal rights *without a proper effort* to discover, detect and punish the violations of law and order." Cong. Globe, 42d Cong., 1st Sess., App. 315 (emphasis supplied). Thus, section 1986 imposes liability on a ". . . person who, having knowledge . . . and having power to prevent or aid in preventing . . . *neglects* . . . so to do . . ." (Emphasis supplied.) Liability under section 1986 requires an unwillingness to act in the face of actual knowledge. *See, Hampton v. City of Chicago*, 484 F.2d 602, 610 (7th Cir. 1973) *cert. denied*, 415 U.S. 917 (1974). This is wanton conduct, not negligence.

It is clear then that only intentional conduct was meant to be proscribed by the enactment of section 1983.

B. This Court's Decisions Confine Section 1983 To Intentional Conduct.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court did not dispense with the need to allege a general intent to engage in conduct which results in a constitutional deprivation and certainly did not hold that negligent conduct which produced such a result was actionable. The conduct alleged in *Monroe* was purely intentional, flagrantly so. Further, in *Monroe*, the Court indicated that it was concerned with "an official's *abuse of his position*." 365 U.S. at 172

(emphasis supplied).[17] It is difficult to perceive an abuse of office being anything but intentional conduct.

The subsequent recognition of a qualified immunity for police officers in *Pierson v. Ray,* 386 U.S. 547 (1967) based on good faith demonstrates that intentional conduct was the focus of section 1983, for two reasons. First, the alleged conduct in *Pierson* was intentional. 386 U.S. at 555-557. Second, the assertion of subjective good faith as a matter of common sense is addressed solely to intentional conduct or deliberate omission. Under *Pierson,* the officer also had to act pursuant to a reasonable belief to assert good faith. This objective element of the immunity standard cannot co-exist with negligence, which by definition, is unreasonable behavior because "[in] the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* 146 (4th ed. 1971).

After *Pierson* came *District of Columbia v. Carter,* 409 U.S. 418 (1973). There, this Court reversed a Court of Appeals' decision which included *dicta* that a public official might be liable in negligence under section 1983. *Carter v. Carlson,* 447 F.2d 358, 365

[17]In his dissenting opinion in *Paul v. Davis,* 424 U.S. 693, 717 (1976), Mr. Justice Brennan quotes the above language from *Monroe* with the same emphasis, but leaves open the question "whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power." In discussing tort claims against public officials generally, Professor Louis L. Jaffe has stated: "Our central concern is the control of official power. . . . This means, for one thing that our emphasis will be on deliberated rather than negligent conduct, on misuse of power rather than inadvertent miscalculation." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 Harv. L.R. 209 (1963).

(D.C. Cir. 1971). This Court reversed on other grounds, but stated: "[W]e intimate no view on the merits of respondent's claims insofar as they are based on other theories of liability." 409 U.S. at 420 n.3. If negligent conduct were embraced by the Civil Rights Act, then this specific reservation would have been unnecessary.

Then, in rapid succession, came *Wood v. Strickland, Rizzo v. Goode, Paul v. Davis,* and *Estelle v. Gamble.*

In *Wood* [420 U.S. 308 (1975)],[18] this Court gave definition and content to the qualified immunity afforded public officials in *Pierson v. Ray* and in *Scheuer v. Rhodes,* 416 U.S. 232 (1974). The court stated that a public official had a qualified immunity for good faith conduct and became liable for damages under section 1983 only when he acted either with "malicious intent" to cause a deprivation of constitutional rights or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. 420 U.S. at 322. This liability attaches only when settled, unquestioned constitutional rights are involved. *Id.*

Less than one year after *Wood,* the court decided *Rizzo v. Goode,* 423 U.S. 362 (1976). There, the plaintiffs sought an injunction under section 1983 to impose a constitutional duty on supervisory city officials for failing to act to eliminate police misconduct. *Id.* at 376. This Court stated that a persistent pattern of police misconduct alone was insufficient.

[18]*See also, O'Connor v. Donaldson,* 422 U.S. 563, 577 (1975).

A showing that it was based on *deliberate* policy of the supervisory officials (*Id.* at 374)[19] or flowed from an *intentional* effort to invade constitutional rights (*Id.* at 375),[20] was also required. Thus, in the context of injunctive relief, more than a deprivation of rights must be shown, *deliberate* participation by the public officials sought to be enjoined is required. A failure to act, presumably through negligence, is insufficient to justify relief. *Id.* at 376.

Only two months after *Rizzo, Paul v. Davis,* 424 U.S. 693 (1976) was filed. In strongly worded *dicta,* the Court rejected the notion that section 1983 made actionable all common-law torts engaged in by state officials. Specifically, it was stated that the fourteenth amendment was not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701.[21] *See also, Griffin v. Breckenridge,* 403 U.S. 88, 100-102 (1971). Concern was indicated lest "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" be thought to have claims under section 1983. *Id.* at 698. The majority rather clearly indicated that negligent torts were singularly inappropriate for application of section 1983. *Id.* at 698-699. Moreover, the dissent did not contest the majority's evident

[19]As was true in *Hague v. C.I.O.*, 307 U.S. 496 (1939).

[20]As was true in *Allee v. Medrano,* 416 U.S. 802, 812, 814-815 (1974).

[21]A California prisoner may sue a public employee "for injury proximately caused by his negligent or wrongful act or omission." Cal. Gov. Code § 844.6(d).

disapproval of negligence as a basis of section 1983 liability.[22]

Finally, earlier this term, the court announced its decision in *Estelle v. Gamble,* ..... U.S. ....., 45 L.W. 4023 (1976), holding that allegations of negligence in medical treatment by prison officials at most state a cause of action for malpractice cognizable in state courts. A cause of action under section 1983 is available only where prison personnel intentionally deny or delay a prisoner access to medical care or intentionally interfere with the treatment once prescribed, so as to evidence a "deliberate indifference" to a prisoner's serious illness or injury. 45 L.W. 4025-4026.

In *Estelle,* this Court recognized that though prison officials had a duty to provide medical care to prisoners and injury resulted, the nature and quality of the conduct and not simply its consequences had to be evaluated to determine whether there was a section 1983 claim. Thus, the Court of Appeals erred when it held that section 1983 "places no narrow limitation on the nature and quality of the conduct which it makes actionable but concerns itself entirely with the consequences of that conduct." (App. Pet. vii.) Even though the harmful consequences may be identical, under *Estelle* only when they result from deliberate indifference, and not simply from negligence, is there a section 1983 cause of action.

These cases give implicit recognition to the primary deterrent rationale of the statute. A section 1983

[22]*See,* footnote 17, *ante.*

remedy might well deter deliberate conduct or omission, but is not likely to have much impact on inadvertent negligence. Permitting trials to go forward seeking money damages for negligent conduct against underpaid prison guards and wardens will not achieve penal reform. It may even have a reverse effect; capable personnel may leave or be discouraged from entering the correctional service.[23]

Moreover, the burden of Civil Rights litigation on the federal courts is well documented and cannot be ignored. In 1960, approximately 300 cases were filed under the general heading of civil rights. In 1974, some 8,400 such cases were filed.[24] The fears expressed by many congressmen in 1871 that the act would work an imbalance in our system of federalism is slowly being realized whenever lower federal courts open their doors to new theories of liability not contemplated by the originators of the legislation. To hold that negligence in any form states a federal claim will subject to the burden of a jury trial and possible liability in damages, thousands of state and local public officials, including prison officials, from the lowliest clerk to a senior executive. As aptly observed in *Jenkins v. Meyers,* 338 F.Supp. 383 (N.D.Ill.E.D.

[23]Aldisert, *Judicial Expansion of Federal Jurisdiction,* 1973 Law & Soc. O. 557, 565-566.

[24]*See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1 (1974). The 1974 Annual Report, Administrative Office of the United States Court, Table 49, p. 220-221, shows that state prisoners filed 218 civil rights cases in 1966, 4,174 in 1973 and 5,236 in 1974. Thus, there was a 2,300 percent increase in 1974 over 1966 and a 25 percent increase of 1974 over 1973. A total of 8,400 civil rights cases were filed in 1974. *Id.* Table 41, p. 205.

1972) *aff'd* 481 F.2d 1406 (7th Cir. 1973), to hold that unintentional torts state a section 1983 claim:

> "would convert every minor mistake especially in the milieu of a prison, into a §1983 violation. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." 338 F.Supp. at 390.[25]

This Court has recently made a similar observation:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect

[25]As noted in *Preiser v. Rodriguez,* 411 U.S. 475 (1972):

> "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." 411 U.S. at 492. *Also see, Wolff v. McDonnell,* 418 U.S. 539, 561-562 (1974).

or ill-advised personnel decisions." *Bishop v. Wood,* ..... U.S. ....., 48 L.Ed.2d 684, 693 (1976).

In sum, both the historical origins of section 1983 and the decisions of this Court teach that intentional conduct or a wilful failure to act evincing deliberate indifference to settled rights—and not negligence—states a cause of action under the statute.[26] Here, Navarette's third cause of action alleges only negligent and inadvertent conduct by the subordinate correctional officers and negligent training of the subordinates by the supervisory officials (A 12-13). Navarette's complaint was drafted by counsel. Hence, *Haines v. Kerner,* 404 U.S. 519 (1972) affords him no solace. Since negligence does not suffice to support a claim under section 1983, the Court of Appeals erred in reversing the district court judgment granting summary judgment of the third cause of action.[27]

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[26]Some lower federal courts have misapprehended the true scope of § 1983; however, the modern trend rejects negligence as a basis for section 1983 liability. Note especially *Bryan v. Jones,* 530 F.2d 1210 (5th Cir. 1976) [en banc]; limiting *Whirl v. Kern,* 407 F.2d 781 (5th Cir. 1969) and *Bonner v. Coughlin,* 545 F.2d 565, (7th Cir. 1976) [en banc] limiting *Joseph v. Rowlen,* 402 F.2d 367 (7th Cir. 1968); *see, Jenkins v. Meyers,* 338 F.Supp. 383 (N.D. Ill. E.D. 1972) *aff'd,* 481 F.2d 1406 (7th Cir. 1973); *also see Harper v. Cserr,* 544 F.2d 1121, 1124 n.1, 1125 (1st Cir. 1976); *Williams v. Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974); *Kent v. Prasse,* 265 F.Supp. 673 (N.D. Pa. 1967) *aff'd,* 385 F.2d 406 (3rd Cir. 1967); *cf., Howell v. Cataldi,* 464 F.2d 272, 279 (3rd Cir. 1972); *Brown v. United States,* 486 U.S. 284, 286 (8th Cir. 1973); *contra, McCray v. Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972).

[27]By a parity of reasoning, the Court of Appeals also erred in reversing the dismissal of plaintiff's sixth claim; alleging negligent termination of certain of his legal activities (A 17).

C. Plaintiff Has Suffered No Constitutional Deprivation.

In any event, it is petitioners' position that Navarette suffered no constitutional deprivation cognizable under section 1983.

Navarette alleged that petitioners negligently and inadvertently failed to mail certain of his letters in 1971 and 1972 thereby violating his right of free speech. The Court of Appeals held that this allegation stated a claim for deprivation of a "fundamental and reasonably well-defined" right of the prisoner plaintiff.

In *Wood v. Strickland,* 420 U.S. 308, 321-322 (1975), this Court held that a public official is liable under section 1983 only for acting in disregard of "basic, unquestioned constitutional rights" of which he was or should have been aware. In 1971 and 1972 there was no fundamental right of a prisoner to correspond as part of a first amendment right of free expression or otherwise. To the contrary, a number of cases indicated there was no such right. *McCloskey v. Maryland,* 337 F.2d 72 (4th Cir. 1964); *Lee v. Tahash,* 352 F.2d 970 (8th Cir. 1965); *Sostre v. McGinnis,* 442 F.2d 178, 199 (2nd Cir. 1971) *cert. den. sub nom., Oswald v. Sostre,* 405 U.S. 978 (1972). Lower court decisions in the Ninth Circuit finding such a right came later. *Martinez v. Procunier,* 354 F.Supp. 1092, 1097 (N.D. Cal. 1973); *McKinney v. DeBord,* 507 F.2d 501, 505 (9th Cir. 1974).

Indeed, in *Procunier v. Martinez,* 416 U.S. 396, 408 (1974) this Court declined to create such a right. The court also commented on the variety of inconsis-

tent approaches taken by the lower federal courts concerning regulation of inmate correspondence stating:

> ". . . the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them . . ." 416 U.S. at 407.

If the posture of the law was uncertain in 1974, it was even less settled in 1971 and 1972. Applying the qualified immunity doctrine of *Wood v. Strickland* in this context precludes liability as a matter of law since there simply was no "undisputable", "unquestioned", "clearly established" right of a prisoner (or even of his addressee) to correspond, protected by the First Amendment. 420 U.S. at 321-322. A public official cannot be "mulcted in damages" for failing to predict "the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 555-557 (1967). *A fortiori,* subordinate prison officials should not be subjected to trial and damages liability for such failure.

Under our federal system, no constitutional right is "clearly established" until first articulated by this Court and then a reasonable period of time for dissemination of this Court's ruling is permitted.[28] In *Martinez,* this Court held only that a free person had a First Amendment right to correspond with a prisoner. 416 U.S. at 408. The court noted that this right "does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter." *Id.* Thus, even if *Martinez* had been settled law in 1971-1972, it would have been the nonprisoner addressees, not Navarette, who had a section 1983 cause of action for damages.[29]

[28] *See, Rizzo v. Goode,* 423 U.S. 362, 377-380 (1976); *cf., Schneckloth v. Bustamonte,* 413 U.S. 218, 249 (1973).

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

Dated, February 28, 1977

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(Appendix Follows)

[29] *See also, Mukmuk v. Com'r of Dept. of Correctional Services,* 529 F.2d 272, 277-278 (2nd Cir. 1976).

APPENDIX

Appendix

(A) 42 *United States Code,* section 1986 provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

(B) *California Government Code* section 844.6 provides:

"§ 844.6. Injury by or to prisoner

(a) Notwithstanding any other provision of this part, except as provided in this section and in Sections 814, 814.2, 845.4, and 845.6, a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Except for an injury to a prisoner, nothing in this section prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed."

(C) *California Director of Corrections' Rules then read:*

"D2402. USE OF THE MAIL PRIVILEGES.

* * *

"10. You may not send registered or certified mail, or any communication or article requesting a return receipt, without permission of the institutional head. Nothing in these rules shall deprive you of correspondence with your attorney, or with the courts having jurisdiction over matters of legitimate concern to you."

"13. Except with the permission of the institutional head, you may not correspond with other inmates or ex-inmates of any correctional institution. In addition we must obtain the permission of their *supervisor* before you can correspond with anyone on probation or parole."

"D2403. APPROVAL OF CORRESPONDENCE LIST. Except by permission of the institutional head, you will be permitted to correspond only with those whose names appear on your approved correspondence list. This list will be limited to ten names. Special purpose letters may be authorized."